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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6965

PAUL WILLIAM JORDAN,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WAS PETITIONER'S CONFESSION INDUCED BY ANY CONDUCT OF THE OFFICERS WHO QUESTIONED HIM AND WAS HIS CONFESSION THEREFORE VOLUNTARY AND ADMISSIBLE?

II. SHOULD CERTIORARI BE GRANTED TO CONSIDER THE CONSTITUTIONALITY OF ARIZONA'S CAPITAL SENTENCING PROCEDURES UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS?

A. DOES THE ARIZONA DEATH PENALTY STATUTE HAVE TO PROVIDE THE ACCUSED WITH JURY INPUT AS TO THE EXISTENCE OF MITIGATING CIRCUMSTANCES AND THE APPROPRIATENESS OF THE PENALTY OF DEATH?

B. DOES ARIZONA'S DEATH PENALTY STATUTE ADEQUATELY TAKE INTO ACCOUNT THE HISTORY AND CHARACTER OF THE OFFENDER IN EVALUATING THE APPROPRIATENESS OF IMPOSING THE DEATH PENALTY?

C. CAN THE ARIZONA DEATH PENALTY STATUTE CONSTITUTIONALLY PLACE THE BURDEN OF PROVING MITIGATING CIRCUMSTANCES UPON THE ACCUSED?

D. DOES THE EXISTENCE OF PROSECUTORIAL DISCRETION IN ARIZONA RENDER ARIZONA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL?

STATEMENT OF THE FACTS

Petitioner's Statement of Facts is substantially accurate. However, the circumstances surrounding the taking of petitioner's statement in Weathersford, Texas on May 1, 1974 need to be set forth in somewhat greater detail.

On May 1, 1974 Detective Schoenfeld and Lt. Christensen, of the Tempe Police Department arrived in Weathersford, Texas to interview petitioner. Petitioner made a 13 page statement and he signed it on each page. (R.T. I at 5.) Before making the

statement petitioner was advised of his Miranda rights and he signed a rights waiver form. Detective Schoenfeld also signed the waiver form as a witness. (Id. at 7-8.)

Petitioner related that he was in Tempe, Arizona on January 15, 1974. He went to a small grocery store on the city's main street in late afternoon, just before dark, to purchase some cigarettes. When he saw the money in the cash register he pulled out a .38 caliber revolver and attempted to rob the person behind the cash register. This person refused to give the money to him. When it looked like the person was reaching for a bulge like a gun in his pocket petitioner fired and shot him. He then took the money from the cash register and left. (R.T. II at 34-35.) During the course of the statement petitioner was shown a photograph of Abraham Osso, the victim of the murder. Petitioner identified it as a photograph of the man that he had shot. (Id. at 40-41.) Petitioner was also shown two photographs of the victim's store which he identified as the store which he had robbed. (Id. at 41-42.)

Petitioner took the stand and testified during the voluntariness hearing which was held before trial. (R.T. I at 42-53.) He admitted that he made the statement willingly, and that he understood the implications of what he was telling the officers. (Id. at 46.) The officers put no pressure on him and made no threats. There was no coercion of any kind. (Id. at 48.) Petitioner testified that he made the statements because he was told that the charges would be dropped on his girl friend, Nancy Caldwell, and that he would not get the death penalty. He said that he was told that he would get a life sentence and that the most he would do was 7 or 7 and 1/2 years before parole eligibility. He was also told that he could get medical attention in Arizona. (Id. at 43-44.) He admitted, however, that neither Detective Schoenfeld nor Lt. Christensen made any guarantees about his sentence. However, it was his

impression that a promise had been made that he would not receive the death penalty. (Id. at 47.)

Detective Schoenfeld testified that there was a conversation with petitioner before he made his statement which lasted approximately an hour and a half. (R.T. I at 10.) Petitioner asked to see his girl friend, Nancy Caldwell, and the officers complied. (Id. at 30.) Petitioner then asked the officers to get his Texas robbery charges dropped. They attempted to comply with this demand and in petitioner's presence called the prosecuting attorney involved. The prosecutor indicated that there would be no deals and they told petitioner this. (Id. at 12.) Petitioner then asked whether the charges against his girl friend, Nancy Caldwell, could be dropped. (Id. at 16.) The officers told him that that would be up to the authorities in Weathersford. They contacted Mr. Tandy the prosecuting attorney who was handling the case. Petitioner and his girl friend were brought up to Mr. Tandy's office where they had a private conversation. After the conference they came out and Tandy indicated that petitioner would give a statement. (Id. at 17.)

Petitioner also asked the officers their opinion about the kind of sentence he would get in Arizona if he gave a statement and whether there was a death penalty in Arizona. (Id. at 14.) Lieutenant Christensen told petitioner that it was his opinion, and he made it clear that it was his opinion, that he doubted that he would get the death penalty. (Id. at 14.) Petitioner was never given a promise that he would not get the death penalty and he was told that his ultimate sentence would be up to the judge and jury. (Id. at 33.) Petitioner was also concerned about whether he would spend his time in prison in Arizona or Texas. However, the officers made no promises with respect to whether he would be able to serve his time in Arizona as opposed to Texas. (Id. at 29.) They

did tell him, however, that Arizona had a more serious charge and that therefore he would probably be allowed to do his time in Arizona. (Id. at 30.) He also asked if his extradition procedures could be expedited so that he could be returned to Arizona as soon as possible. The officers replied that they would try to arrange this. (Id. at 30.)

In summary then, petitioner initiated a series of requests. He wanted to see his girl friend and the officers complied. He wanted to get the charges on her dismissed and the detectives tried to do so through Mr. Tandy. He wanted to know how much time he could get, whether there was a death penalty and whether or not it would be imposed on him. He wanted to know about whether his own Texas charges could be dropped and the detectives tried to make some arrangement in that regard. The testimony conflicts over whether any promises had been made, petitioner claiming that he had an impression of a promise and the officers saying that no promises were made.

Following the voluntariness hearing the trial court found that the petitioner's statements were made knowingly, voluntarily, and intelligently with a full understanding of his rights and that no threats, duress, coercion or promises of immunity of any kind were made to induce him to make the statements. (Id. at 52.) Petitioner's claims of involuntariness were also presented to the jury. Petitioner's attorney made an extensive argument about the circumstances surrounding the statement and asked the jury to disregard the statement if they felt that it was not rendered voluntarily. (R.T. III at 26-33.) The court also instructed the jury as follows:

> "You must not consider any statement made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statement voluntarily. The defendant's statement is not voluntary whenever a law enforcement officer

> used any sort of violence or threats or promise of immunity or benefit."
>
> (Id. at 46-47.)

The jury nonetheless returned a guilty verdict.

ARGUMENT

I

PETITIONER'S CONFESSION WAS NOT INDUCED BY ANY CONDUCT OF THE OFFICERS WHO QUESTIONED HIM AND HIS CONFESSION WAS THEREFORE VOLUNTARY AND ADMISSIBLE.

The Supreme Court of Arizona considered petitioner's present claim that his confession was involuntary because it was induced by promises made to him by Arizona authorities. They rejected his contentions. The Court noted that all of the "bargaining" involved was initiated by petitioner. He told the officers that he would make a statement if certain conditions were met. They reasoned that because all of the "bargaining" initiated with petitioner he could not have been induced to confess by the police. The court further found with respect to the discussions concerning Arizona's death penalty that the officer's statements did not amount to a "promise". Lieutenant Christensen made it clear to petitioner that it was merely an opinion and that the matter was ultimately up to the judge and jury. Furthermore, the court found that the discussions about the death penalty occurred after petitioner had already told the officers that he would talk if certain conditions were met. Therefore, even if the statements by Lieutenant Christensen could be considered a "promise" it was not a promise that was relied upon by petitioner in his decision to make a statement. His decision had already been made before the discussions concerning the death penalty were initiated. See State v. Jordan, ___ Ariz. ___, 561 P.2d 1224, 1226-1227 (1976).

In arriving at its decision the Court indicated that they found the reasoning and analysis in Taylor v. Commonwealth, 461 S.W.2d 920 (Kentucky 1970), cert. denied, 404 U.S. 837, to be persuasive. In Taylor the defendant, as did petitioner here, solicited the promises which were made. He could therefore not be said to have been the victim of compelling influences visited upon him by the authorities. Other courts have followed the same reasoning. State v. Harwick, 220 Kan. 572, 552 P.2d 987 (1976); State v. Hutson, 537 S.W.2d 809 (Missouri Court of Appeals 1976); United States v. Arcedarno, 371 F.Supp. 457, 469 (D.N.J. 1974); State v. LeMarr, 83 N.M. 18, 487 P.2d 1088 (1971), see also Roberts v. State, 545 S.W.2d 157 (Tex.Crim.App. 1977); Hunter v. Swenson, 372 F.Supp. 287, 301-302 (W.D. Missouri 1974), affirmed, 504 F.2d 1104 (8th Cir. 1974), cert. denied, 420 U.S. 980; People v. Burton, 253 N.W.2d 691 (Mich.App. 1977); Jackson v. State, 13 Md.App. 31, 280, A.2d 914 (1971).

Petitioner initiated all the bargaining in this case. It was he who set the conditions for making the statement and it was he who refused to make a statement until the officers satisfactorily met the conditions which he set down. Had the officers refused to meet the conditions and had they insisted that petitioner make his statement before they would seek to meet those conditions petitioner might have a better argument for coercion. Haynes v. State of Washington, 373 U.S. 503, 514, 83 S.Ct. 1336, 1343, 10 L.Ed.2d 513 (1963). But the officers did nothing of the kind. They did the only thing they could be expected to do when confronted by a suspect who schrewdly bargained with them to meet certain conditions before he would make a statement. They met his conditions. They at no time insisted on receiving a statement before they would meet the conditions which he had set down.

The controlling test is this:

> "'[A] confession, in order to be admissible must be free and voluntary: that is, . . . not . . . obtained by any direct or implied promises, however slight . . .'"
>
> Bram v. United States, 168 U.S. 532, 542-543, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897).

It is clear that the kinds of promises which are condemned are those which are used by law enforcement officers in an effort to elicit a confession from a person who was unwilling to make a statement:

> "A coerced confession claim, whether founded on a promise of immunity or otherwise, always involves this question: did the governmental conduct complained of 'bring about' a confession 'not freely self-determined'? . . . "
>
> Shotwell Manufacturing Company v. United States, 371 U.S. 341, 348, 83 S.Ct. 448, 453, 9 L.Ed.2d 357 (1963).

The test has been further defined as being a question of whether petitioner's will was overborne and his capacity for self-determination critically impaired by the conduct of the police. Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1867, 6 L.Ed.2d 1037 (1961); Haynes v. State of Washington, supra. The focus of inquiry therefore is on the conduct of the officers. Here the officers did nothing more than acquesce in petitioner's stated conditions. They made no "promises" in an attempt to elicit a confession from petitioner.

It can perhaps be argued that the petitioner's confession would not have been forthcoming "but for" the satisfaction by the officers of the conditions which he had set forth. This court recently made it clear, however that that kind of causal relationship between a promise and confession is not the kind condemned by the Fifth Amendment. Hutto v. Ross, ___ U.S. ___, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976). All indications on the record here are that although the actions of the officers may have been a factor in causing petitioner to make his confession,

the circumstances and conditions for making the confession were voluntarily set up by petitioner himself.

Petitioner also complains that he confessed because he had been promised that he would receive a life sentence rather than the death penalty if he confessed to murdering Mr. Osso. However, Detective Schoenfeld and Lieutenant Christensen both testified that they at no time made any such promise. Petitioner himself testified at trial that the officers never guaranteed that he would not receive the death penalty. That was only his impression. (R.T. II at 142, lns. 8-23.) Petitioner at the time he made the statement was not unfamiliar with the processes of the criminal justice system. (Id. at 138-139.) He must have been aware that the police could not guarantee him that he would not receive the death penalty, especially when they told him that sentencing was ultimately up to the judge and jury.

In considering whether a confession is voluntary the totality of all the surrounding circumstances must be taken into account. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Here there were no threats or any kind of coercion at all. Petitioner was fully advised of his constitutional rights and in fact executed a written waiver of those rights before making his statement. He was given an opportunity to check the typed statement for accuracy and he signed each page. The opinions which the petitioner solicited regarding the death penalty in Arizona and which he now charges were inducements to confess were at best notions created in his own mind rather than by any actions of the police. He was never promised anything with respect to a sentence and was in fact told the opposite: that the ultimate sentence was up to the judge and jury. Under these cirucmstances the confession of petitioner was voluntary and freely given and was properly admitted into evidence against him.

ARGUMENT

II

CERTIORARI NEED NOT BE GRANTED TO CONSIDER THE CONSTITUTIONALITY OF ARIZONA'S DEATH PENALTY STATUTE BECAUSE PETITIONER'S QUESTIONS II B, C, & D WERE NOT RAISED BELOW AND BECAUSE ARIZONA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

INTRODUCTION

In his opening brief in the Supreme Court of Arizona petitioner argued that Arizona's death penalty statute, Ariz.Rev. Stat.Ann. § 13-454, was unconstitutional under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), because it allowed the judge to arbitrarily impose the death penalty. Subsequent to the filing of his opening brief this Court rendered Its decisions in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); and, Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). The Supreme Court of Arizona permitted petitioner to file a supplemental brief in which he argued that Ariz.Rev.Stat.Ann. § 13-454 was unconstitutional because it denied a capital defendant the right to a judgment of a jury as to the existence of aggravating and mitigating circumstances and also as to the appropriateness of the death penalty. The Supreme Court of Arizona in rendering its decision decided that Ariz.Rev.Stat.Ann. § 13-454 was not constitutionally defective by being arbitrary because the sentencing authority was given adequate information and guidance. They held that the judge's discretion in sentencing was confined to narrow limits and he was given such purposeful

direction that it was extremely unlikely that the death penalty would be imposed freakishly or arbitrarily. Furthermore, they held, relying on Proffitt v. Florida, supra, that a capital defendant was not constitutionally entitled to jury input into the decision on whether or not to impose death.

The petitioner raises four issues in regard to the death penalty in this Court: (1) Lack of jury input as to the existence of mitigating circumstances and also the appropriateness or the death penalty; (2) failure of Arizona's death penalty statute to take into account the history and character of the offender; (3) placing the burden of showing mitigating circumstances upon the accused; (4) inappropriate prosecutorial discretion in filing of murder charges. (See: Petition for Writ of Certiorari, p. i-ii.)

It can readily be seen that, although petitioner raises four grounds for the unconstitutionality of Ariz.Rev.Stat.Ann. § 13-454 before this Court, only one of those grounds was presented to the Supreme Court of Arizona. (See: Appellant's Opening and Supplemental Briefs before Arizona Supreme Court.) Owing to petitioner's failure to present these additional grounds raised here, the Supreme Court of Arizona has not been provided an opportunity to decide whether Ariz.Rev.Stat.Ann. § 13-454 provides for the following: meaningful consideration of mitigating circumstances relating to the history and character and record of the individual offender; whether it is constitutionally permissible to impose the burden of proving mitigating circumstances on the capital defendant; and, whether the existence of prosecutorial discretion in Arizona to put on aggravating circumstances renders Ariz.Rev.Stat.Ann. § 13-454 unconstitutionally arbitrary. These three federal questions have neither been timely nor properly raised below. There are certain minimal requirements for raising a federal question in state court:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time."
>
> New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928).

Unless a federal question is properly and timely presented to the state courts so that it is actually decided or necessarily decided by the state court this Court will not consider it. 28 U.S.C. § 1257 (3); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Lynch v. New York, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934).

Respondent will briefly respond to each of petitioner's four grounds for asserting the unconstitutionality of Ariz.Rev. Stat.Ann. § 13-454. In so doing, respondent in no way waives the argument that in failing to present in state court three of the grounds which he now presses upon this Court, he has failed to present a federal question.

A.

THE ARIZONA DEATH PENALTY STATUTE DOES NOT HAVE TO PROVIDE THE ACCUSED WITH JURY INPUT AS TO THE EXISTENCE OF MITIGATING CIRCUMSTANCES AND THE APPROPRIATENESS OF THE PENALTY OF DEATH.

Petitioner attacks Ariz.Rev.Stat.Ann. § 13-454 because it does not provide for jury input into the death penalty decision. This is an unusual position for the opponents of the death penalty to take because they have traditionally feared jury participation in this area. McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). More recently in Gregg v. Georgia, supra, it was argued that the aggravation/mitigation guidelines for the jury were too broad and vague and allowed for arbitrary grants of mercy. Gregg v. Georgia, supra, 428 U.S. at 200 through 204, 96 S.Ct. at 2936-2937. This Court noted that although jury sentencing might be desirable in death

penalty cases "to maintain a link between contemporary community values and the penal system", Gregg v. Georgia, supra, 428 U.S. at 190, 96 S.Ct. at 2933 jury sentencing does create problems. Material that might be relevant in sentencing could have little relevance and indeed be prejudicial when consideration of guilt is involved. Although much of the problem can be solved by use of a bifurcated procedure for determination of guilt and sentencing, many problems still remain. Juries can be given carefully drafted and narrowly drawn guidelines regarding the factors which they are to consider in determining whether or not to impose the penalty of death. However:

> ". . . the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. . . . To the extent that this problem is inherent in jury sentencing, it may not be totally correctible."
>
> Gregg v. Georgia, supra, 428 U.S. at 192, 96 S.Ct. at 2934.

Petitioner argues first of all that an evaluation of capital sentencing practices in the United States indicates a definite trend toward jury sentencing and away from judicial sentencing in capital cases. This, in petitioner's view, indicates that jury sentencing is a "principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental". In view of past opposition to jury sentencing by opponents of the death penalty one would think that petitioner would regard this trend as undesirable. In any event, this Court has pointed out that it has never suggested that jury sentencing is required by the constitution. Proffitt v. Florida, 428 U.S. at 252, 96 S.Ct. at 2966. Jury sentencing as the Court noted in Gregg v. Georgia, supra, involves perhaps insurmountable problems.

Judicial sentencing on the other hand:

> "should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."
>
> (Id.)

Jury sentencing may perform an important societal function, Proffitt v. Florida, 428 U.S. at 252, 96 S.Ct. at 2966, but this gain can be offset by a jury's tendency to act arbitrarily or capriciously even when given standards and guidelines. The fact that the democratic process in Arizona, by way of state elections and legislative deliberations, has chosen to come down on the side of stressing uniformity and less arbitrariness in the imposition of the death penalty cannot in itself be said to have deprived petitioner of any constitutional right.

Petitioner also argues that because there was no jury input into the decision to impose the death penalty on him he was denied that link between contemporary community values and the penal system which was described in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). But the existence of the death penalty statute and its procedures do reflect contemporary community values. Ariz.Rev.Stat.Ann. § 13-454 is nothing less than the democratic expression of the community will in Arizona. And this is an evolving standard as well. The Arizona Legislature recently amended Ariz.Rev.Stat. Ann. § 13-454 by adding an additional mitigating circumstance requiring the sentencing authority to consider the defendant's age in addition to the other four mitigating circumstances in determining whether to impose the death sentence. 33rd Arizona Legislature First Regular Session, Session Laws, Chapter 142 section 58, effective October 1, 1978. Community input is therefore felt through the legislative process.

Finally, petitioner argues that because findings of fact are required in applying the aggravating/mitigating circumstances of Ariz.Rev.Stat.Ann. § 13-454 he has a constitutional right to a jury determination of those facts. He reasons that since Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) held that the constitutional protections of due process applied to the method of allocating the burden of proof not only on questions of guilt or innocence but also in connection with determining the degree of criminal culpability, that he has a right to a jury determination of the factual questions which trigger the imposition of the death penalty. However, the degree of criminal culpability and the sentencing are two different things. Furthermore, appellant reads too much into Mullaney. The Court did not intend Mullaney to require the prosecution to prove beyond a reasonable doubt every fact affecting the degree of criminal culpability. See Patterson v. New York, No. 75-1861, 21 Cr.L. 3145, n. 15 (1977). Mullaney only held that one could not place on a defendant the burden of proving by a preponderance of evidence the facts which distinguish manslaughter from murder. Nowhere did Mullaney suggest that once the degree of culpability of a defendant has been properly determined in accord with due process that the same kind of constitutional factors come into play when it comes time to impose sentence for the particular degree of homicide which was found by the jury.

B.

ARIZONA'S DEATH PENALTY STATUTE ADEQUATELY TAKES INTO ACCOUNT THE HISTORY AND CHARACTER OF THE OFFENDER IN EVALUATING THE APPROPRIATENESS OF IMPOSING THE DEATH PENALTY.

Petitioner argues that Ariz.Rev.Stat.Ann. § 13-454 "forecloses consideration of the whole character of the defendant as a human being, and a 'particularized consideration of relevant aspects of

the character and record of each convicted defendant before the imposition upon him of a sentence of death'. [Citations omitted.]" But a close examination of the statute reveals that petitioner's argument is specious.

In State v. Richmond, ____ Ariz. ____, 560 P.2d 41 (1976), appellant argued that because the statute did not specifically limit the mitigating circumstances which could be considered by the sentencing authority to those enumerated in the statute it allowed the judge to consider any mitigating circumstances he chose to consider. This he theorized rendered the statute unconstitutionally ambiguous. State v. Richmond, supra, 560 P.2d at 50. In response the Supreme Court of Arizona held that the sentencing authority was authorized to consider only the mitigating circumstances enumerated in the statute. (Id.) This does not mean however, that the statute forecloses consideration of the character and record of the individual offender. Ariz. Rev.Stat.Ann. § 13-454(B) provides:

> "Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence in criminal trials. . . ."

The Arizona statute therefore clearly provides that any evidence from the character and record of the individual offender may be considered when relevant to the determination of the existence of any of the mitigating circumstances. The statute does not foreclose considering these factors.

A defendant's age, his past record, his mental condition and other factors in his character and record invariably become factors to be considered in the determination of whether or not the enumerated mitigating circumstances exist. For example, a particular defendant's age, mental condition and past criminal record are relevant to resolving the question under Ariz.Rev.Stat.

Ann. § 13-454(f)(2), as to whether or not he was acting under substantial and unusual duress. Those factors are also relevant as to the question of the defendant's capacity to appreciate the wrongfulness of his conduct under Ariz.Rev.Stat.Ann. § 13-454(f)(1). When a particular defendant is very young or mentally retarded these factors would obviously be relevant and admissible as to all the mitigating circumstances which the court must consider. Ariz.Rev.Stat.Ann. § 13-454(F).

In State v. Osborne, 49 Ohio. St. 2d 135, 359 N.E.2d 78 (1976) the Supreme Court of Ohio faced an argument similar to petitioner's with respect to Ohio's death penalty statute, Ohio R.C. 2929.02 through 2929.04. Ohio's mitigating circumstances are set forth in Ohio R.C. 2929.04(B):

> "(1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Appellant in State v. Osborne, supra, argued that these mitigating circumstances were unconstitutionally narrow. The Supreme Court of Ohio responded by pointing out that the statute itself required the sentencing authority to consider the nature of the offense and the history, character and condition of the offender in arriving at a determination as to whether the three statutory mitigating circumstances were established.

In the same way, although Ariz.Rev.Stat.Ann. § 13-454 does not in so many words require that the character and record of the individual offender be taken into account, the statute in effect requires them to be considered. For example, in State v. Ceja, 3102-2, Slip Opinion filed May 16, 1977 appellant argued that he was under unusual and substantial duress at the time of

the commission of the homicides because at the time of the murders he was experiencing marital problems, had an unpromising employment future and his wife had suffered a miscarriage. The Supreme Court of Arizona at no time said that these were not proper factors to be considered. They noted however, that there was nothing on the record to indicate that at the time of the murders appellant was experiencing either marital or employment difficulties. The record did disclose that some three months prior to the homicides appellant's wife had suffered a miscarriage. However, there was nothing presented to demonstrate nor was it argued that appellant was affected by the miscarriage on the day of the murders or that the miscarriage was in any way connected with the murder. It is clear that this information was before the sentencing judge at the time of consideration of the penalty to be imposed. In the usual case a presentence report is prepared and available to the court and the parties before the aggravation/mitigation hearing. See Ariz.Rev.Stat.Ann. § 13-454(B). See State v. Ceja, Slip Opinion at 3. Had there been a connection between the miscarriage and appellant's conduct, it is clear that this would have been a permissible factor for the sentencing authority to consider.

The Arizona statute therefore does not preclude consideration of character and record of the individual offender in arriving at a determination of the existence of the mitigating factors. The mitigating circumstances enumerated in the statute by the legislature adequately present the sentencing authority with the character and record of the individual offender so that an informed decision can be made.

. . .

C.

THE ARIZONA DEATH PENALTY STATUTE CONSTITUTIONALLY PLACES THE BURDEN OF PROVING MITIGATING CIRCUMSTANCES UPON THE ACCUSED.

Petitioner's argument seems to be that the burden of going forward and the burden of persuasion for establishing the mitigating circumstances should fall on the prosecutor rather than the capital defendant. If in fact that is petitioner's argument then respondent finds it hard to believe that any capital defendant would want to rely upon the prosecutor to establish mitigating circumstances in his case after having put on the proof establishing his guilt. If, on the other hand, he is arguing that the burden should fall on the prosecutor to disprove the existence of the mitigating circumstances beyond a reasonable doubt, then he has misread Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Mullaney held that it violated due process for Maine to require the defendant in a homicide case to prove the existence of heat of passion, which spelled the difference between murder and manslaughter. However, nothing in Mullaney suggests that the prosecutor should also bear the burden of persuasion in respect to mitigating circumstances. This Court recently said in Patterson v. New York, 75-1861, 21 C.R.L. 3145, (1977) that:

> ". . . even if we were to hold that a State must prove sanity to convict once that fact is put in issue, it would not necessarily follow that a State must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment."
>
> 21 C.R.L. at 3148.

The Court also commented on the intended scope of Mullaney:

> "Mullaney's holding, it is argued, is that the State may not permit the blameworthiness of an act or the severity of

> punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden or proving the presence or absence of that fact, as the case may be, beyond reasonable doubt. . . . . Mullaney . . . should not be so broadly read." 21 C.R.L. at 3150. See also n. 15 at 21 C.R.L. 3150.

Patterson makes it clear that the Court did not intend Mullaney to have such a broad reading as petitioner calls for here. The state may properly require the defendant to prove the existence of mitigating factors.

D.

THE EXISTENCE OF PROSECUTORIAL DISCRETION IN ARIZONA DOES NOT RENDER ARIZONA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL.

Petitioner argues that this court should grant certiorari in his case because in State v. Murphy, 113 Ariz. 416, 555 P.2d 1110 (1976) the Supreme Court of Arizona reduced a death sentence to life. Pursuant to a plea bargain the defendant in Murphy pled guilty to first degree murder. In exchange the prosecutor dismissed charges of kidnapping and armed robbery and agreed to recommend that he receive a life sentence instead of the death penalty. Contrary to the wishes of both parties the trial court ordered the prosecutor to put on aggravating circumstances. The court then found the existence of one aggravating circumstance and no mitigating circumstances. and imposed the death penalty.

The Supreme Court of Arizona noted that Ariz.Rev.Stat.Ann. § 13-454(B) imposed on the prosecutor the burden of establishing the existence of any of the aggravating circumstances. The court held that the decision to put on aggravating circumstances at the aggravation/mitigation hearing was within the traditional discretion of the prosecutor with which the courts generally and traditionally had no power to interfere. The court noted that the

record disclosed several good reasons for the prosecutor's action in accepting the plea agreement. For example, there were legal questions about the admissibility of statements given by the victim sometime after he had been shot. There were doubts about whether the defendant's actions fell within the aggravating circumstances enumerated in the statute and at that time there was also some question as to the constitutionality of the statute. There were therefore good reasons for the prosecutor to negotiate a plea agreement and recommend a life sentence rather than the death penalty.

The Supreme Court of Arizona's decision in State v. Murphy, supra, represented a refusal to allow the trial courts to interfere in the traditional discretion of prosecutors to negotiate plea bargains under terms and conditions acceptable to both sides. This is precisely the kind of discretionary action on the part of the prosecutor that was held not to offend the constitution in Gregg v. Georgia, supra, 428 U.S. at 199, 96 S.Ct. at 2909.

> "The petitioner's argument is nothing more than a veiled contention that Furman indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. . . . Such a system, of course, would be totally alien to our notions of criminal justice.
>
> Moreover, it would be unconstitutional. Such a system in many respects would have the vices of the mandatory death penalty statutes . . ."
>
> Gregg v. Georgia, supra, 428 U.S. at 199-200, n. 50, 96 S.Ct. 2937-2938.

There is no reason to grant certiorari in petitioner's case because in some other case the prosecutor has exercised the kind of discretion inherent in the criminal justice systems

of every state. The fact that the Supreme Court of Arizona will not allow that discretion to be tampered with by the trial courts is no reason to grant certiorari.

CONCLUSION

The Court should refuse to grant petitioner's petition for writ of certiorari because he has raised no issues meriting this Court's consideration. Petitioner's confession was made freely and voluntarily and not as a result of coercion or promises of any kind. The police conduct did not overbear his will and force him to confess. Petitioner also raises three grounds for the unconstitutionality of Ariz.Rev.Stat.Ann. § 13-454 which were never raised below and which were not decided by the Arizona Supreme Court and should not be considered for the first time before this Court on Certiorari.

Furthermore, the argument that petitioner was entitled to jury input into the decision to impose the death penalty is lacking in merit. For all of these reasons respondent respectfully requests that the court deny the petition for writ of certiorari.

Respectfully submitted,

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I, STANLEY L. PATCHELL, being first duly sworn, declare that pursuant to Rule 33, I have served a copy of the attached Response to Petition for Writ of Certiorari on petitioner's attorneysby depositing the same, addressed as follows, in the United States mail:

DAVID E. KENDALL, ESQ.
100 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
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Said service was sent postage prepaid on July 19, 1977.

Stanley L. Patchell

STANLEY L. PATCHELL

SUBSCRIBED AND SWORN to before me this 19th day of July, 1977.

Elizabeth J. Bender

NOTARY PUBLIC

MY COMMISSION EXPIRES:
July 17, 1978